

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MICKEY J. GIBSON,

Plaintiff,

v.

WASHINGTON STATE
UNIVERSITY, and University
Officials to be identified, acting in their
official capacities,

Defendants.

NO: 12-CV-5118-TOR

ORDER GRANTING DEFENDANT’S
MOTION TO DISMISS

BEFORE THE COURT is Defendant Washington State University’s Motion
to Dismiss (ECF No. 8). This matter was heard without oral argument¹ on

¹ In his memorandum opposing the motion, Plaintiff states that he “does not waive
his right to oral argument in this matter.” ECF No. 13 at 3 (emphasis in original).

Given that Plaintiff did not re-note the motion for hearing with oral argument
pursuant to Local Rule 7.1(h)(3)(b)(iii), the Court will honor Defendant’s decision
to note the motion for hearing without oral argument. *See* ECF No. 12. The Court

1 December 26, 2012. The Court has reviewed the motion, the response, and the
2 reply, and is fully informed.

3 BACKGROUND

4 This is a discriminatory hiring practices case. Plaintiff has alleged that
5 Defendant Washington State University discriminated against him by refusing to
6 hire him for an open position as a Scientific Assistant on account of his age and
7 disability. Defendant now moves to dismiss the Complaint for failure to state a
8 claim on the grounds that it is immune from suit under the Eleventh Amendment
9 and that Plaintiff failed to exhaust his administrative remedies.

10 FACTS

11 Plaintiff, Mickey Gibson ("Plaintiff"), is proceeding *pro se* and *in forma*
12 *pauperis*. Plaintiff was born in April 1954. ECF No. 4 at ¶ 3. In 1996, Plaintiff
13 suffered a stroke which resulted in permanent speech and physical mobility
14 impairments. ECF No. 4 at ¶ 3. Apparently as a result of these conditions,
15 Plaintiff was declared permanently disabled by the Social Security Administration
16 in or about November 2001. ECF No. 4 at ¶ 5.

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19 further determines, pursuant to Local Rule 7.1(h)(3)(b)(iv), that oral argument on
20 the motion is not necessary.

1 In the summer of 2011, Plaintiff applied for “several open positions” listed
2 on Defendant’s public website. ECF No. 4 at ¶ 5. Plaintiff was not offered any of
3 the positions for which he applied. ECF No. 4 at ¶ 5. According to Plaintiff, these
4 positions were awarded to applicants whom Defendant considered to be better
5 qualified. ECF No. 4 at ¶ 5.

6 On May 31, 2012, Plaintiff applied for a position as a Scientific Assistant at
7 Defendant’s campus in Prosser, Washington. ECF No. 4 at ¶¶ 7-8. In conjunction
8 with his online application, Plaintiff submitted a resume, cover letter, answers to
9 specific job-related questions, and a list of references. ECF No. 4 at ¶ 8. In his
10 cover letter addressed to Defendant’s Human Resources Department, Plaintiff
11 stated: “Please note that I am partly disabled from a stroke that happened 16 years
12 ago, but that has not slowed me down very much. It has limited use of my right
13 hand, and slowed my speech, but I have learned to compensate and use the creative
14 portions of my mind.” ECF No. 4 at 16. In the “Education” section of his resume,
15 Plaintiff listed various degrees and certificates dating back to a master’s degree
16 which he obtained in 1967. ECF No. 4 at 18.

17 On June 10, 2012, Plaintiff wrote a letter to Defendant’s Office for Equal
18 Opportunity expressing his frustration at not having been offered an interview.
19 ECF No. 4 at 9. In this letter, Plaintiff reiterated that he was partially disabled, but
20 that he was fully qualified to perform the duties listed in the job description. ECF

1 No. 4 at 9. Plaintiff further advised Defendant that he intended to file a disability
2 discrimination lawsuit in federal court if he was not “at least invited in for real
3 consideration by June 20th.” ECF No. 4 at 9.

4 On or about June 26, 2012, Defendant offered the position to a different
5 applicant. ECF No. 4 at ¶ 10. A representative of Defendant’s Office of Equal
6 Opportunity subsequently responded to Plaintiff’s letter on August 24, 2012. ECF
7 No. 4 at 8. In this letter, Defendant informed Plaintiff that his application “had not
8 been released to the hiring unit” as of June 10th, and that, as a result, “the unit did
9 not know anything about [him] and was not in a position to engage in any form of
10 discrimination against [him].” ECF No. 4 at 8. Defendant further informed
11 Plaintiff of its finding that he had not been subject to discrimination and that it
12 considered the matter closed. ECF No. 4 at 8.

13 Plaintiff filed the instant lawsuit on September 10, 2012. ECF No. 4.
14 Plaintiff’s Complaint lists a single cause of action for “Employment
15 Discrimination in Denial of Employment Due Solely to Age or Disability.” ECF
16 No. 4. Defendant moved to dismiss the Complaint for failure to state a claim on
17 November 2, 2012. ECF No. 8.

18 DISCUSSION

19 A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6)
20 “tests the legal sufficiency of a [plaintiff’s] claim.” *Navarro v. Block*, 250 F.3d

1 729, 732 (9th Cir.2001). To survive a Rule 12(b)(6) motion, a plaintiff must allege
2 facts which, when taken as true, “state a claim to relief that is plausible on its
3 face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotation and citation
4 omitted). To satisfy this standard, the allegations in a complaint must be sufficient
5 “to raise a right to relief above the speculative level.” *Bell Atlantic Corp. v.*
6 *Twombly*, 550 U.S. 544, 555 (2007). Threadbare recitals of the elements of a cause
7 of action, supported by mere conclusory statements, will not suffice. *Iqbal*, 556
8 U.S. at 678.

9 In addition, a plaintiff's complaint must contain a “short and plain statement
10 of the claim showing that the pleader is entitled to relief.” Fed.R.Civ.P. 8(a)(2).
11 This standard “does not require ‘detailed factual allegations,’ but it demands more
12 than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Iqbal*, 556
13 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555). To determine whether Rule
14 8(a)(2) has been satisfied, a court must first identify the elements of the plaintiff's
15 claim(s) and then determine whether those elements could be proven on the facts
16 pled. Although a court may (and generally should) draw reasonable inferences in
17 the plaintiff's favor, *see Sheppard v. David Evans and Assocs.*, 694 F.3d 1045,
18 1051 (9th Cir.2012), it need not accept “naked assertions devoid of further factual
19 enhancement.” *Iqbal*, 556 U.S. at 678 (internal quotations and citation omitted).

1 The Ninth Circuit has repeatedly instructed district courts to “grant leave to
2 amend even if no request to amend the pleading was made, unless ... the pleading
3 could not possibly be cured by the allegation of other facts.” *Lopez v. Smith*, 203
4 F.3d 1122, 1130 (9th Cir.2000). The standard for granting leave to amend is
5 generous—the court “should freely give leave when justice so requires.”
6 Fed.R.Civ.P. 15(a)(2). In determining whether leave to amend is appropriate, a
7 court must consider the following five factors: bad faith, undue delay, prejudice to
8 the opposing party, futility of amendment, and whether the plaintiff has previously
9 amended the complaint. *United States v. Corinthian Colleges*, 655 F.3d 984, 995
10 (9th Cir.2011).

11 **A. Eleventh Amendment Immunity**

12 Defendant has moved to dismiss Plaintiff’s claims on the ground that
13 Washington State University, as a state agency, is immune from suit under the
14 Eleventh Amendment to the United States Constitution. ECF No. 9 at 7-9. The
15 basic premise of this motion is that Congress did not act pursuant to a valid grant
16 of constitutional authority in enacting Title I of the Americans with Disabilities
17 Act (“ADA”) and the Age Discrimination in Employment Act (“ADEA”). ECF
18 No. 9 at 8-9. Citing to the Supreme Court’s decisions in *Board of Trustees of the*
19 *University of Alabama v. Garrett*, 531 U.S. 356 (2001) and *Kimel v. Florida Board*
20 *of Regents*, 528 U.S. 62 (2000), Defendant argues that “States are entitled to

1 Eleventh Amendment immunity for suits brought under both Title I of the ADA
2 and ADEA.” ECF No. 9 at 9.

3 Defendant has correctly identified the rules of law announced in *Garrett* and
4 *Kimel*. In *Garrett*, the Court held that “Congress did not validly abrogate the
5 States’ [Eleventh Amendment] immunity from suit by private individuals for
6 money damages under Title I [of the ADA].” 531 U.S. at 374 n. 9. Pursuant to
7 this holding, state agencies² may not be sued by private citizens under Title I of the
8 ADA. *Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1185 (9th Cir. 2003). Similarly,
9 in *Kimel*, the Court held that Congress did not validly abrogate the States’ Eleventh
10 Amendment immunity when it enacted the ADEA. 528 U.S. at 91. Consequently,
11 state agencies may not be sued by private citizens for damages under the ADEA.
12 *Id.* In view of this authority, Plaintiff’s claims for monetary damages under Title I
13 of the ADA and the ADEA are barred by the Eleventh Amendment.³

14 ² Local government entities, such as cities and counties, are not entitled to Eleventh
15 Amendment immunity. *Garrett*, 531 U.S. at 368-69.

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17 ³ The Court agrees with Defendant that Plaintiff’s claims are properly classified as
18 claims under Title I of the ADA and the ADEA given that Plaintiff has sued for
19 “Employment Discrimination in Denial of Employment Due Solely to Age or
20 Disability.” ECF No. 4.

1 However, *Garrett* and *Kimel* do not bar suits for declaratory and injunctive
2 relief against *state officials* acting in their official capacities. *See Garrett*, 531 U.S.
3 at 374 n. 9 (“Title I of the ADA still prescribes standards applicable to the States.
4 Those standards can be enforced by the United States in actions for money
5 damages, *as well as by private individuals in actions for injunctive relief* under *Ex*
6 *parte Young*, 209 U.S. 123 (1908).” (emphasis added); *Walsh v. Nevada Dep’t of*
7 *Human Res.*, 471 F.3d 1033, 1036 (9th Cir. 2006) (“Sovereign immunity, however,
8 does not bar Title I suits against state officials for prospective injunctive and
9 declaratory relief.”). Here, Plaintiff has sued Washington State University “and
10 University Officials To Be Identified, acting in their official capacities.” ECF No.
11 4. Plaintiff has also demanded “injunctive relief, consisting of hiring Plaintiff for
12 same or similar local position with Defendant.” ECF No. 4 at ¶ 15. Construing
13 Plaintiff’s Complaint liberally, as it must, the Court finds that Plaintiff is pursuing
14 a claim for injunctive relief against one or more university officials acting in their
15 official capacities. Pursuant to footnote 9 of the *Garrett* decision, such a claim is
16 not barred by the Eleventh Amendment. 531 U.S. at 374 n. 9.

17 **B. Exhaustion of Administrative Remedies**

18 Defendant also seeks dismissal of the Complaint on the ground that Plaintiff
19 failed to file a charge with the Equal Opportunity Employment Commission
20 (“EEOC”) prior to filing this lawsuit. ECF No. 9 at 9-12. “Before filing an ADA

1 suit, a plaintiff must timely file a discrimination charge with the EEOC.” *Douglas*
2 *v. California Dep’t of Youth Auth.*, 271 F.3d 812, 823, n. 12 (9th Cir. 2001) (citing
3 42 U.S.C. § 12117(a)). The ADEA contains a similar requirement. 29 U.S.C.
4 626(d)(1). “Filing a timely charge is a statutory condition that must be satisfied
5 before filing suit in federal court.” *Douglas*, 271 F.3d at 823 n. 12. While failure
6 to file a *timely* EEOC charge will categorically preclude an ADA or ADEA claim,
7 *see Josephs v. Pac. Bell*, 443 F.3d 1050, 1061 (9th Cir. 2006), a plaintiff’s failure
8 to file *any* such charge deprives a federal district court of subject matter
9 jurisdiction. *See Sommatino v. United States*, 255 F.3d 704, 709 (9th Cir. 2001)
10 (“[O]ur case law also holds that substantial compliance with the presentment of
11 discrimination complaints to an appropriate administrative agency *is a*
12 jurisdictional prerequisite.”) (emphasis in original); *Loera v. Cnty. of Imperial*, 256
13 Fed. App’x 961, 963 (9th Cir. 2007). Because Plaintiff did not file a charge with
14 the EEOC or the Washington State Human Rights Commission prior to filing his
15 ADA and ADEA claims, this Court lacks subject matter jurisdiction to adjudicate
16 them. Accordingly, Plaintiff’s claims are dismissed without prejudice.

17 **C. Revocation of In Forma Pauperis Status**

18 Pursuant to 28 U.S.C. § 1915(a)(3), “[a]n appeal may not be taken *in forma*
19 *pauperis* if the trial court certifies in writing that it is not taken in good faith.” The
20 good faith standard is an objective one, and good faith is demonstrated when an

1 individual “seeks appellate review of any issue not frivolous.” *See Coppedge v.*
2 *United States*, 369 U.S. 438, 445 (1962). For purposes of 28 U.S.C. § 1915, an
3 appeal is frivolous if it lacks any arguable basis in law or fact. *Neitzke v. Williams*,
4 490 U.S. 319, 325 (1989).

5 The Court finds that any appeal of this Order would not be taken in good
6 faith and would lack any arguable basis in law or fact. Accordingly, the Court
7 hereby revokes Plaintiff’s *in forma pauperis* status.

8 **ACCORDINGLY, IT IS HEREBY ORDERED:**

- 9 1. Defendant’s Motion to Dismiss (ECF No. 8) is **GRANTED**. Plaintiff’s
10 claims are dismissed without prejudice.
- 11 2. The Court certifies that any appeal of this Order would not be taken in
12 good faith and would lack any arguable basis in law or fact.
- 13 3. Plaintiff’s *in forma pauperis* status is **REVOKED**.

14 The District Court Executive is hereby directed to enter this Order, provide
15 copies to Plaintiff and defense counsel, enter judgment accordingly and **CLOSE**
16 the file.

17 **DATED** this 2nd day of January, 2013.

18 *s/ Thomas O. Rice*

19 THOMAS O. RICE
20 United States District Judge